
United States
Circuit Court of Appeals
For the Ninth Circuit.

CLAUDE EMERSON DuVALL,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

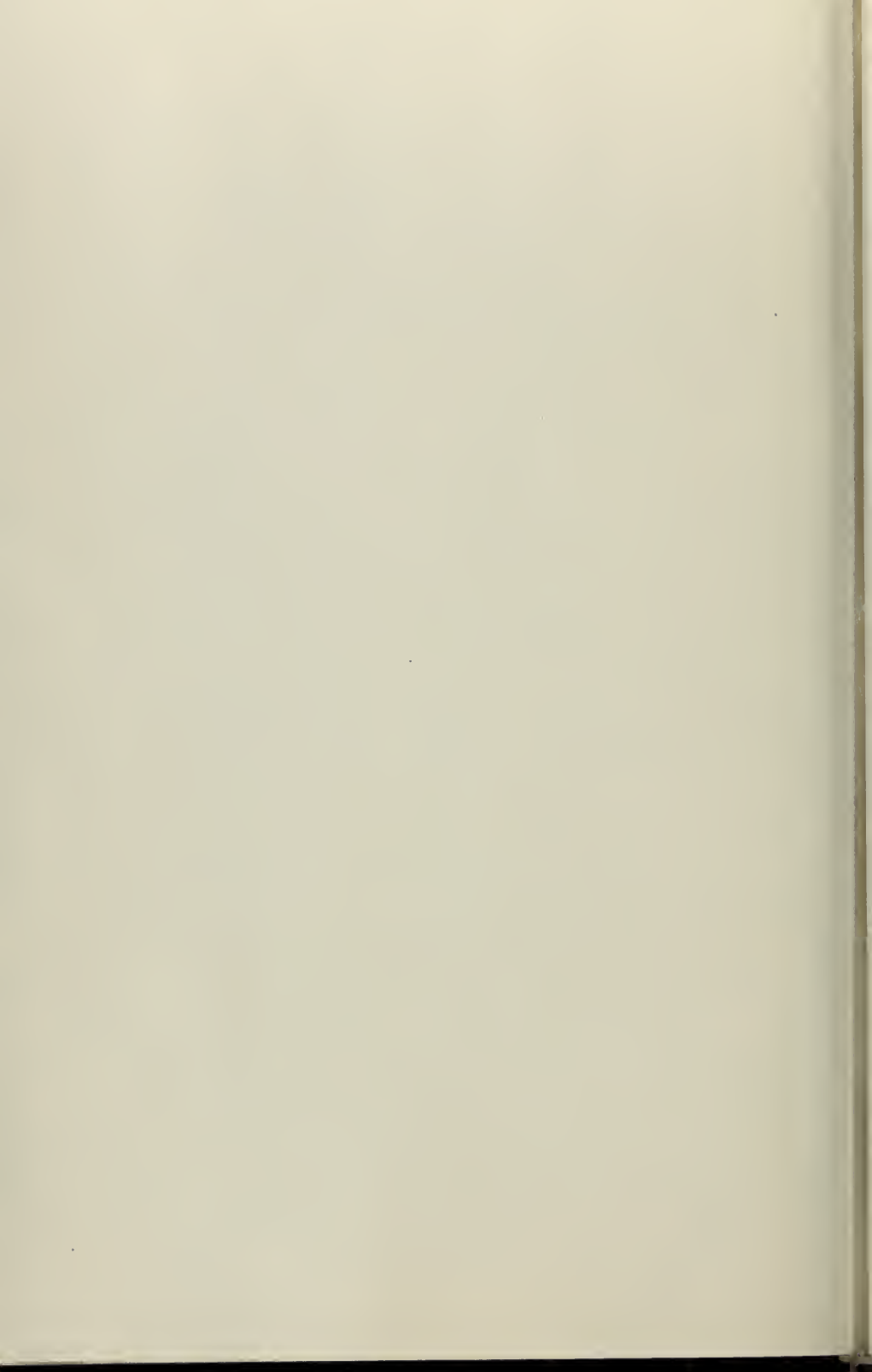
Upon Appeal from the District Court of the United
States for the District of Arizona.

FILED

SEP 13 1935

PAUL P. O'BRIEN,

CLERK



No. 7908

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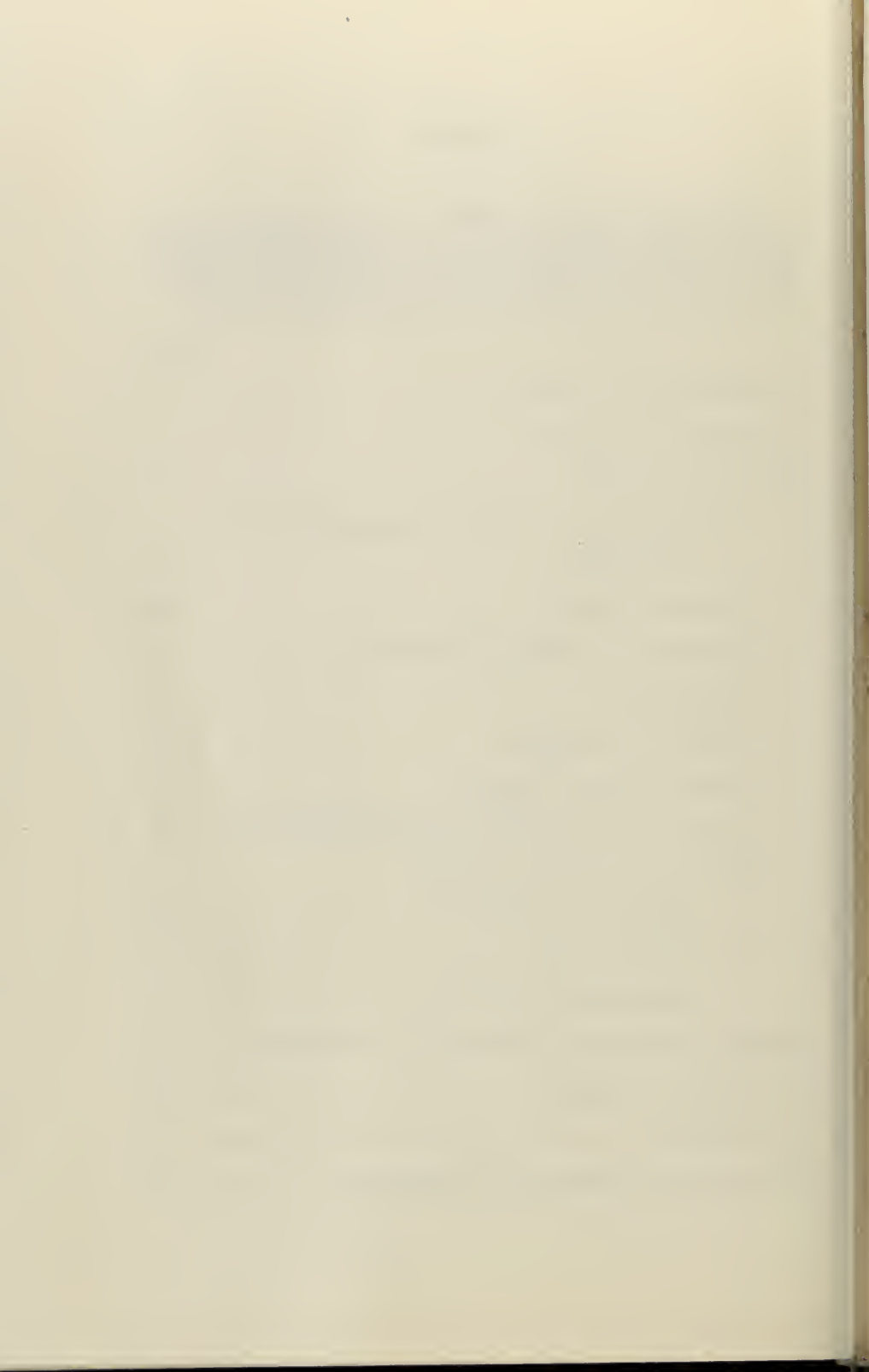
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States for the District of Arizona.



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Assignments of Error.....	4
Attorneys of Record.....	1
Bill of Exceptions.....	15
Certificate and Order Settling Bill of Exceptions	57
Charge to Jury.....	26
General and Special Demurrers.....	16
Judgment	53
Notice of Appeal.....	53
Minute Entry Thereon.....	58
Order to Prepare Bill of Exceptions, etc.....	55
Testimony for Government:	
Moore, C. V. B.....	20
Rooney, Pat	18
Townsend, Dr. S. D.....	22
Clerk's Certificate to Transcript of Record.....	63
Cost Bond on Appeal.....	59
Indictment	1
Praecipe for Transcript of Record.....	62



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Attorney for Appellee. [3*]

In the District Court of the United States for the
District of Arizona.

C-7287 Tucson

Viol: 26 USC 696.

(Issuing prescriptions for narcotic drug not in
pursuance of written order form).

United States of America,
District of Arizona—ss.

In the District Court of the United States in and
for the District of Arizona, at the November
term thereof, A. D. 1934.

The Grand Jurors of the United States, im-
paneled, sworn, and charged at the term aforesaid,
of the Court aforesaid, on their oath present, that
Claude Emerson DuVall, on or about the 26th day
of March, A. D. 1935, and within the said District

*Page numbering appearing at the foot of page of original certified
Transcript of Record.

of Arizona, being then and there a practicing physician, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away certain derivatives and salts of opium, to-wit, 4 grains of morphine sulphate to one Pat Rooney, alias Fred Humphry, not in pursuance of a written order from said Pat Rooney alias Fred Humphry on a form issued in blank for that purpose by the Commissioner of Internal Revenue under the provisions of the Act of Congress of December 17, 1914, as amended, in the manner following, to-wit, that the said Claude Emerson DuVall, at the time and place aforesaid, did issue and dispense to the said Pat Rooney, alias Fred Humphry, a certain prescription for said 4 grains of morphine sulphate, the said prescription being then and there signed by the said defendant, and that the said Pat Rooney, alias Fred Humphry was not then and there a patient of the said Claude Emerson DuVall, and the said morphine sulphate was dispensed and distributed by the said Claude Emerson DuVall not in the course of his professional practice only; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT: And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Claude Emerson DuVall, on or about the 26th day of March, A. D. 1935, and within the said District of Arizona, being then and there a practicing physician, did unlawfully, [4] wilfully, knowingly

and feloniously sell, barter, exchange and give away certain derivatives and salts of opium, to-wit, 3 grains of morphine sulphate to one Pat Rooney, alias Fred Humphry, not in pursuance of a written order from said Pat Rooney alias Fred Humphry on a form issued in blank for that purpose by the Commissioner of Internal Revenue under the provisions of the Act of Congress of December 17, 1914, as amended, in the manner following, to-wit, that the said Claude Emerson DuVall, at the time and place aforesaid, did issue and dispense to the said Pat Rooney, alias Fred Humphry, a certain prescription for said 3 grains of morphine sulphate, the said prescription being then and there signed by the said defendant, and that the said Pat Rooney, alias Fred Humphry was not then and there a patient of the said Claude Emerson DuVall, and the said morphine sulphate was dispensed and distributed by the said Claude Emerson DuVall not in the course of his professional practice only; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

F. E. FLYNN,

United States Attorney for the
District of Arizona.

K. BERRY PETERSON,

Assistant. [5]

C.....

IN THE DISTRICT COURT OF THE
UNITED STATES
for the District of Arizona

UNITED STATES OF AMERICA

vs.

.....

INDICTMENT
A TRUE BILL

Geo Jay
Foreman of the Grand Jury

Witness examined before the Grand Jury:

.....
.....
.....

Presented to the Court in the presence of the
Grand Jury by their Foreman, and filed this.....
day of....., A. D. 193.....

.....,
Clerk.

[Endorsed]: Filed May 2, 1935. [6]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

COMES NOW the defendant, Claude Emerson DuVall, who appeals in the above entitled action, by and through his attorney hereinafter named, and files and presents to the Court his Assignment of Errors whereby said defendant assigns as error in the record and proceedings of the above entitled Court in the above entitled action the following errors, to-wit:

I.

That the court erred in overruling the general and special demurrers to the indictment for the following reasons:

(a) Neither of the counts of the indictment states facts sufficient to constitute an offense under the laws of the United States of America.

(b) Neither of the counts of the indictment charges the defendant with a violation of Sec. 696, Title 26, USCA, or the act of Congress of December 17, 1914, or the amendments thereto, known as the Harrison Narcotic Act.

(c) That if the offenses charged in the indictment fall within the Harrison Narcotic Act, then the Act is void in that it exceeds the power conferred upon the Congress by the Constitution of the United States.

(d) Neither of the counts of the indictment charges that the defendant, sold, bartered, exchanged and gave away morphine sulphate to said Pat Rooney, alias Fred Humphry, in that each of said

counts wholly omits and fails to charge that [7] said Pat Rooney, alias Fred Humphry, ever did obtain the narcotic drug, or any part thereof, upon said prescriptions, or that said prescriptions were ever filled.

II.

The Court erred in permitting counsel for the Government to propound to Dr. S. D. Townsend, a witness called to testify on behalf of the Government, and to permit said witness to answer in the negative, the following hypothetical question, to-wit:

“Now, Doctor, assuming that a narcotic drug addict should apply to a practicing physician for a prescription for narcotic drugs and at the time of such application the physician had knowledge that such applicant was addicted to the use of morphine, and assuming that said applicant was not suffering from any incurable disease, and assuming that without any physical examination except placing a stethoscope on the chest of the applicant and to feel his pulse, not even removing his clothes, such physician should write and deliver to such applicant a prescription calling for 8 half-grain morphine sulphate tablets with no endorsement on such prescription that the said applicant was suffering from any incurable disease except the endorsement ‘Article 85, Exception 1’, and no direction on said prescription as to the dosage of said morphine except ‘Use as directed for relief of pain’, and assuming that some several hours later on that same day the said applicant

should again call upon said physician for another prescription for narcotic drugs and that without any physical examination of such applicant and knowing that the said applicant was then and there a drug addict, said physician should again write and deliver to said applicant a prescription calling for 6 half-grain morphine sulphate tablets with no endorsement on such prescription that this applicant was suffering from any incurable disease except the endorsement 'Article 85, Exception 1' and no direction on said prescription as to the dosage of such morphine except 'Use as needed for [8] relief of pain'. Assuming further that the morphine so prescribed was to come into such applicant's possession to administer at such time and in such quantities as he desired to use it, state whether in your opinion such prescriptions were issued in good faith in the course of the professional practice only of such physician."

That by permitting the foregoing question to be propounded, and by permitting the witness to answer it in the negative, the Court erred as follows, to-wit:

(a) That said hypothetical question is in part essentially predicated upon Article 85, Exceptions 1 & 2, of Regulations Number 5, promulgated on January 1, 1928 by the Commissioner of Internal Revenue with the approval of the Secretary of the

Treasury; that said Article and Exceptions are contrary to the prohibitions of the Harrison Narcotic Act in so far as it applies to physicians, and are beyond the regulatory power conferred by said act upon the Secretary of the Treasury and the Commission of Internal Revenue in so far as they apply to this defendant.

(b) That if the Harrison Narcotic Act confers upon the foregoing executive officers power thus to regulate physicians registered under the act, then it is an unwarranted and unconstitutional delegation of power.

(c) That said Article and Exceptions are an unlawful attempt by executive officers of the Government to legislate upon matters solely conferred upon Congress by the Federal Constitution.

(d) That the regulations prescribed by said Article and Exceptions attempt to exert a power in its application to this defendant which is reserved to the several states.

(e) That the Harrison Narcotic Act does not limit a physician registered under the act to the prescribing of morphine sulphate to persons afflicted only with incurable diseases. [9]

III.

The Court erred in denying the motion of the defendant, at the close of the Government's case in chief, and at the close of the whole case, to instruct the jury to return a verdict of acquittal upon the following grounds, to-wit:

(a) That there is a fatal variance between the proof and the indictment in that the proof discloses that the sale of the narcotic drug by the defendant was made to Government Narcotic Agent, C. V. B. Moore, and not to Pat Rooney, alias Fred Humphry, as charged in both counts of the indictment.

IV.

The Court erred in giving the following instruction during the course of its charge to the jury, to-wit:

“The Harrison Narcotic Act further provides: ‘The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of the Act into effect.’ Such rules and regulations were duly promulgated, as required by the Act, and among other provisions of the regulations now in force and effect is the following: Article 85, which reads as follows: ‘A prescription in order to be effective in legalizing the possession of unstamped narcotic products and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the Act.’ ”

“Now, there are certain exceptions to the rule, set forth as follows: ‘Exceptions to this rule may be properly recognized, (1), in the treatment of incurable disease, such as cancer, advanced tuberculosis, and other diseases well [10] recognized as coming within this class, where a physician directly in charge of a bona fide patient suffering from such disease prescribes for such patient, in the course of his professional practice and strictly for legitimate medical purposes, and in so prescribing endorses upon the prescription that the drug is dispensed in the treatment of an incurable disease; or if he prefers, he may endorse upon the prescription ‘Exception (1) Article 85’. (2) A physician may prescribe for an aged or infirm addict whose collapse would result from the withdrawal of the drug, provided he endorse upon the prescription that the patient is aged and infirm, giving age, or if he prefers he may endorse upon the prescription, ‘Exception (2) Article 85’.”

“Now Gentlemen, you are instructed that the phrases ‘to a patient’ and ‘in the course of his professional practice only’ as used in the statute and rules and regulations which have been read to you, are intended to confine the immunity of the registered physician in dispensing narcotic drugs strictly within the bounds of the physician’s professional practice and not to extend it to sale by such physician intended to cater

to the appetite or satisfy the cravings of one addicted to the drug only. A prescription issued for either of the latter purposes protects neither the physician who knowingly issues it nor the dealer who knowingly accepts and fills it."

"The statute does not prescribe the disease for which morphine may be supplied. Regulation 85 in its provisions forbids the giving of a prescription to an addict or habitual user of narcotics not in the course of professional treatment, but for the purpose of providing him with a sufficient quantity to keep him comfortable by maintaining his customary use. Neither the statute nor the regulations precludes a physician from giving an addict a moderate amount of drugs in order to relieve a condition incident to addiction, if the physician acts in good faith and in accord with fair medical standards." [11]

The foregoing instruction is erroneous and prejudicial for the following reasons, to-wit:

(a) That said instruction is in a material part predicated upon Article 85, Exceptions 1 and 2, of the regulations promulgated with reference to the enforcement of the Harrison Narcotic Act, which Article and Exceptions are contrary to and exceed the prohibitions of said act.

(b) That said Article and Exceptions are beyond the regulatory power conferred upon the Secretary of the Treasury and the Commissioner of Internal

Revenue in so far as they apply to physicians and to this defendant.

(c) That if the Harrison Narcotic Act confers upon such executive officers authority thus to regulate physicians registered under the act, then it is unwarranted and unconstitutional delegation of power.

(d) That said Article and Exceptions constitute an unlawful attempt by executive officers of the Government to legislate upon matters solely conferred upon Congress by the Federal Constitution.

(e) That the regulations prescribed by said Article and Exceptions are an attempt to exert authority in its application to this defendant which is reserved to the several states.

(f) That the foregoing instruction is contradictory and confusing in that the court charged the jury in the language of the foregoing Article and Exceptions, both of which preclude a physician issuing a prescription to a morphine addict not suffering from an incurable disease named in Exception 1, or who is not aged and infirm as stated in Exception 2, and then charged the jury that Article 85, Exceptions 1 and 2, do not preclude a physician from prescribing for an addict an amount of morphine sufficient to relieve a condition incident to addiction.

(g) That the foregoing instruction is erroneous in [12] that it charged the jury that the Harrison Narcotic Act, and Article 85, Exceptions 1 and 2, forbade the defendant, as a physician, to prescribe morphine to the said Pat Rooney, alias Fred Hum-

phry, to satisfy the cravings resulting from his addiction to the use of morphine.

V.

The Court erred in giving the following instruction during the course of its charge to the jury, to-wit:

“The good faith of the defendant treating the witness, Pat Rooney, as a physician, for the purpose of curing him from the narcotic habit is an important issue involved in this case. One of the objects of the Narcotic Act was no doubt intended to prevent the growing use of these narcotics deemed a menace to the nation by Congress. If a physician and the others mentioned in the exceptions could sell and dispense these narcotics regardless of the fact whether it be done in good faith for the relief of a patient, then the moral object of the Act is entirely defeated, notwithstanding the fact that it is primarily a revenue measure. It cannot be claimed that a physician selling and dispensing these narcotics through a prescription, or otherwise, not in good faith for the purpose of securing the cure of one suffering from an illness, or to cure him from the narcotic habit, is doing so in the course of his professional practice only as prescribed by the express language of the Act.”

The foregoing instruction is erroneous and prejudicial for the following reasons, to-wit:

(a) That the foregoing instruction directed the attention of the jury to the moral aspect of the Harrison Narcotic Act, whereas the act must be justified, if at all, as a revenue measure in its application to the charges laid in the indictment herein.

(b) That the foregoing instruction was calculated [13] to, and it did, prejudice the jury against the defendant in that it injected into the case an issue that is unwarranted and, if warranted, was improperly limited and defined.

(c) That the foregoing instruction limited the defendant, as a physician registered under the Harrison Narcotic Act, to prescribing the narcotic drug only for curing illness and for curing the said Pat Rooney of the narcotic habit.

WHEREFORE, this appealing defendant, by reason of errors assigned aforesaid, prays the judgment and sentence imposed upon him be reversed and held for naught.

LESLIE C. HARDY,
Attorney for Defendant and Appellant.

Service of the foregoing Assignment of Errors admitted this 5th day of August, 1935.

FRANK E. FLYNN,
United States Attorney.
By K. BERRY PETERSON,
Assistant United States Attorney.

[Endorsed]: Filed Aug. 5, 1935. [14]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the 2nd day of May, 1935, the indictment was returned by the grand jury and filed herein against the defendant, and on the 12th day of June, 1935, and after the defendant had entered his plea of not guilty to both counts of the indictment, this cause came on for trial before the above entitled court and a jury, the Honorable Albert M. Sames, Judge Presiding, the United States of America appearing by its counsel, K. Berry Peterson, Esq., and John P. Dougherty, Esq., Assistant United States Attorneys, and the defendant, Claude Emerson DuVall, appearing by his counsel, Leslie C. Hardy, Esq., Clarence V. Perrin, Esq., and Milton Cohan, Esq.; that after said cause was tried and submitted to the jury, as aforesaid, the jury on the 20th day of June, 1935, reported to the court that they were unable to agree upon a verdict, and said jury was on said day discharged by the court; that on the 25th day of June, 1935, said cause again came on for trial before the above entitled court and a jury, the Honorable Albert M. Sames, Judge Presiding, and the United States of America and the defendant appearing by the same counsel; that after said indictment was returned and filed, as aforesaid, and before the defendant entered his plea of not guilty, and before the cause first came on for trial, as aforesaid, the following proceedings were had:

The defendant filed General and Special Demurrers to the indictment which recite as follows: [15]

[Title of Court and Cause.]

GENERAL AND SPECIAL DEMURRERS.

COMES NOW Claude Emerson DuVall, the above named defendant, and demurs to the indictment in the above entitled action, and as grounds therefor, shows to the Court:

GENERAL DEMURRER.

That none of the two counts contained in said indictment state facts sufficient to constitute an offense under the laws of the United States.

SPECIAL DEMURRER.

I.

That none of the counts of said indictment charge or accuse the defendant of any violation of Title 26, Sec. 696, U. S. C. A., or of any of the provisions of the Act of Congress of December 17, 1914, or the amendments thereto.

II.

That said indictment, and each of the counts thereof, are duplicitous in that they join separate offenses in each of the counts of said indictment.

III.

That said indictment, and each of the counts thereof, does not charge that said defendant sold, bartered, exchanged or gave away any of the Nar-

cotics described therein to the said Pat Rooney, alias Fred Humphry, or any other person.

IV.

That said indictment, or any of the counts thereof, does not allege that the defendant participated in the sale of the drugs described in said indictment to the said Pat Rooney, alias Fred Humphry.

V.

That the Acts of Congress, and the amendments thereto, upon which the indictment herein is found and returned, are void [16] in that they contravene the Constitution of the United States of America and are wholly beyond the power of Congress to enact in so far as said Acts of Congress pertain herein.

WHEREFORE, defendant prays that these demurrers be sustained and that the indictment herein be quashed and dismissed.

OTTO E. MYRLAND

Attorney for Defendant.

(Filed May 13, 1935)

The General and Special Demurrers were overruled by the court on May 21st, 1935, and the defendant excepted.

During the presentation of the Government's case in chief, and to maintain the issues upon its part, counsel for the Government introduced in evidence, without objection, a certified copy of the license of

the defendant to practice medicine within the State of Arizona. Counsel for the Government and the defendant stipulated, before the evidence was closed, that the defendant, at the time mentioned in the indictment, was a physician registered under the provisions of the Harrison Narcotic Act and had paid the tax required by said Act.

At the time the second trial of this cause came on for hearing, and after the jury was sworn and empaneled to try the cause, and before any testimony was offered or given, the defendant again submitted and urged the foregoing General and Special Demurrers which were by the court again overruled, and the defendant excepted.

Whereupon the United States of America called

PAT ROONEY

as a witness on behalf of the government who testified in part as follows: [17]

Examination by Mr. Peterson: My name is Fred Rooney. I am sometimes known as Pat Rooney and Fred Humphry. I am 35 years old and I have been addicted to the use of morphine sulphate for 18 or 19 years. I have known the defendant, Dr. Claude Emerson DuVall, for approximately three and one-half years. When I first consulted Dr. DuVall I

(Testimony of Pat Rooney.)

told him I was afflicted with bronchial asthma. He examined me by feeling my pulse and placing a stethoscope on my chest for a few seconds. He did not remove my shirt. I have no disease that I know about, except I have been addicted to the use of morphine sulphate for 18 or 19 years having used as much as 10 or 15 grains per day. On March 26, 1935 I was confined in the city jail at Tucson. On that day at about 2:30 or 3:00 P. M. Government Narcotic Agent C. V. B. Moore gave me money and sent me to Dr. DuVall's office to purchase a prescription for morphine sulphate. Mr. Moore accompanied me to the building where Dr. DuVall's office is located and waited for me in front of the building while I secured the prescription. At that time Dr. DuVall gave me a prescription for 4 grains of morphine sulphate. Mr. Moore took me to the Sixth and Sixth Pharmacy in Tucson where I had the prescription filled, and Mr. Moore gave me the money to fill it. I received the morphine sulphate on the prescription and gave it to Mr. Moore. Government's Exhibit No. 3 which you hand me is the prescription which Dr. DuVall gave me. Said Exhibit, abstracted to the record, is as follows:

“A prescription dated March 26, 1935 for eight one-half grains of morphine sulphate issued by Dr. C. E. DuVall to Fred Humphry and endorsed: Article 85, Section 1. Use as directed for relief of pain.”

The witness Rooney continuing: On the same day at about 10:00 P. M. I went with Narcotic Agent

(Testimony of Pat Rooney.)

Moore to the home [18] of Dr. DuVall at Tucson and there received from Dr. DuVall a prescription for 3 grains of morphine sulphate. Mr. Moore waited outside while I went into Dr. DuVall's house. Mr. Moore gave me the money to pay Dr. DuVall for this prescription. Government's Exhibit No. 2 which you hand me is the prescription which Dr. DuVall wrote and gave to me at this time. Said Exhibit, abstracted to the record, is as follows:

“A prescription dated March 26, 1935 for six one-half grains of morphine sulphate issued by Dr. C. E. DuVall to Fred Humphry and endorsed: Article 85, Section 1. Use as directed for relief of pain.”

The witness Rooney continuing: After I received this prescription from Dr. DuVall, Mr. Moore took me to the Santa Rita Drug Store at Tucson where I had the prescription filled. Mr. Moore gave me the money to have the prescription filled. I received the morphine sulphate on the prescription and delivered it to Mr. Moore.

Whereupon

C. V. B. MOORE

was called as a witness on behalf of the government who testified in part as follows:

Examination by Mr. Dougherty: I am employed as a Narcotic Agent for the United States Government and have been so employed for about ten years. I have known Pat Rooney for about that length of

(Testimony of C. V. B. Moore.)

time. On March 26, 1935 I sent Pat Rooney to Dr. DuVall's office to obtain a prescription for morphine sulphate. I gave Pat Rooney the money to pay for the prescription. I waited for Pat Rooney in front of the building where Dr. DuVall's office is located. Rooney returned to me with a prescription from Mr. DuVall for 4 grains of morphine sulphate. Government's Exhibit No. 3 which you hand me is the prescription. [19] This occurred about 2:30 or 3:00 P. M. on March 26, 1935. I then took Rooney to the Sixth and Sixth Pharmacy in Tucson and gave him the money to fill the prescription. He returned from the pharmacy and gave the filled prescription to me which I kept in my possession in the narcotic safe at Phoenix until it was introduced in evidence at this trial. On March 26, 1935 at about 10:00 P. M., I took Pat Rooney to Dr. DuVall's residence at Tucson and gave him money to secure a prescription from Dr. DuVall for morphine sulphate. I remained outside and Pat Rooney went into Dr. DuVall's house and returned with a prescription for 3 grains of morphine sulphate from Dr. DuVall. Government's Exhibit No. 2 which you hand me is that prescription. Then I took Rooney to the Santa Rita Drug Store in Tucson and gave him the money to fill this prescription. Pat Rooney had this prescription filled at the Santa Rita Drug Store and turned the morphine over to me which I kept in my possession in the narcotic safe in Phoenix until it was introduced in evidence in this trial.

Whereupon

DR. S. D. TOWNSEND

was called as witness on behalf of the government who testified as follows:

My name is S. D. Townsend. I am a licensed physician practicing in Tucson, Arizona. I examined Pat Rooney in the city jail on March 26, 1935 and did not find him suffering from any organic disease. He is a chronic addict to morphine sulphate.

Thereupon counsel for the government read and submitted the following hypothetical question to Dr. Townsend:

By Mr. Peterson: "Now, Doctor, assuming that a narcotic drug addict should apply to a practicing physician for a prescription for narcotic drugs and at the time of such application the physician had knowledge that such applicant was addicted to the use of morphine, and assuming that said applicant was not suffering from any incurable disease, and [20] assuming that without any physical examination except placing a stethoscope on the chest of the applicant and to feel his pulse, not even removing his clothes, such physician should write and deliver to such applicant a prescription calling for 8 half-grain morphine sulphate tablets with no endorsement on such prescription that the said applicant was suffering from any incurable disease except the endorsement 'Article 85, Exception 1', and no direction on said prescription as to the dosage of said morphine except 'Use as directed for relief of pain', and assuming that some several

(Testimony of Dr. S. D. Townsend.)

hours later on that same day the said applicant should again call upon said physician for another prescription for narcotic drugs and that without any physical examination of such applicant and knowing that the said applicant was then and there a drug addict, said physician should again write and deliver to said applicant a prescription calling for 6 half-grain morphine sulphate tablets with no endorsement on such prescription that this applicant was suffering from any incurable disease except the endorsement 'Article 85, Exception 1' and no direction on said prescription as to the dosage of such morphine except 'Use as needed for relief of pain'. Assuming further that the morphine so prescribed was to come into such applicant's possession to administer at such time and in such quantities as he desired to use it, state whether in your opinion such prescriptions were issued in good faith in the course of the professional practice only of such physician?"

Mr. HARDY: The defendant objects to said hypothetical question for the reason that it is in part essentially predicated upon Article 85, Exception 1 & 2, or Regulations No. 5, promulgated on January 1, 1928 by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, which Regulations are so promulgated in connection with the enforcement of the Harrison Narcotic Act, and which [21] are in evidence. The Article and Exceptions referred to in the hypothetical question are as follows:

(Testimony of Dr. S. D. Townsend.)

ARTICLE 85

“Purpose of issue.—A prescription, in order to be effective in legalizing the possession of unstamped narcotic drugs and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the act; and the person filling and receiving drugs under such an order, as well as the person issuing it, may be regarded as guilty of violation of the law.”

“Exceptions.—Exceptions to this rule may be properly recognized (1) in the treatment of incurable disease, such as cancer, advanced tuberculosis, and other diseases well recognized as coming within this class, where the physician directly in charge of a bona fide patient suffering from such disease prescribed for such patient, in the course of his professional practice and strictly for legitimate medical purposes, and in so prescribing endorses upon the prescription that the drug is dispensed in the treatment of an incurable disease; or if he prefers he may endorse upon the prescription ‘Exception (1), Article 85’. (2): A physician may prescribe for an aged and infirm addict whose collapse would result from the withdrawal of the drug,

(Testimony of Dr. S. D. Townsend.)

provided he endorses upon the prescription that the patient is aged and infirm, giving age; or if he prefers he may endorse upon the prescription 'Exception (2), Article 85'."

Mr. Hardy continuing: Said Article and Exceptions are contrary to the prohibitions of the Harrison Narcotic Act, [22] and are beyond the regulatory power conferred upon the Secretary of the Treasury and the Commissioner of Internal Revenue by said Act in so far as they apply to physicians and to this defendant; that if the Harrison Narcotic Act confers upon such executive officers power to so regulate physicians registered under the Act, then it is an unwarranted and unconstitutional delegation of power; that the Article and Exceptions are an unlawful attempt by executive officers of the government to legislate upon matters solely conferred upon Congress by the Federal Constitution: and lastly, that the regulations prescribed by said Article and Exceptions are an attempt to exert a power in its application to this defendant which is reserved to the several states.

The COURT: Objection overruled and defendant excepted.

The Witness answering: I should say "No."

At the close of the government's case in chief the defendant demurred to the evidence, and moved the

court to instruct the jury to return a verdict of acquittal, upon the following grounds:

That there is a fatal variance between the proof and the indictment in that the proof discloses that the sale of the morphine sulphate by the defendant was made to Government Narcotic Agent, C. V. B. Moore, and not to Pat Rooney, alias Fred Humphry, as charged in the indictment.

The COURT: Motion denied and defendant excepted.

At the close of the whole case defendant again demurred to the evidence, and moved the court to instruct the jury to return a verdict of acquittal upon the grounds made at the time the government closed its case in chief. The motion was denied and defendant excepted. [23]

Thereupon, and after the case was argued to the jury by counsel for the respective parties, the court charged the jury. The charge in its entirety is as follows:

“The COURT: Now, Gentlemen of the Jury, you have listened patiently and attentively to this case during the heat that has prevailed for the last four or five days in the court room. You have heard the evidence presented here by both the Government and the defense, and you have listened to the summing up by counsel for both the prosecution and the defense from their viewpoints of the case.”

“Under the law, at the close of the evidence and the arguments of counsel, the duty devolves on the Court to charge you as to the law governing the case itself before the case is finally submitted to you for your verdict on the law and the evidence on the charges contained in the indictment.”

“Now, Gentlemen, there is no higher duty to which a man can be called, which more absolutely demands that he not allow the slightest feeling of sentiment to affect the workings of his mind, than when he is charged to help decide whether the law of his country has been violated by a fellow citizen. That is the reason why the law required every juror to take a solemn obligation that he will discharge his duties without fear or favor. This is an obligation higher than and destructive of any fraternal, social or other tie which may exist between any juror and any one otherwise interested in the case, as party, counsel or officer of the Court. Honest and self-respecting jurors do not need such an oath to secure the proper discharge of their duties. It is administered to you only because the law required it to be done. Jurors who do respect themselves and their responsibilities do and should object to efforts which appear to them to be deliberate attempts to set their minds off from a true consideration of the case, or appeals to their emotions, feelings, likes and dislikes, and sympathies, and [24] intelligent jurors, who are honest and determined to do their full duty in their high office—for yours, Gentlemen, although a temporary, is a very high

office,—will not allow themselves to be worked off of the track of true consideration of what is evidence on the point at issue, nor will they heed arguments based on collateral matters, which often, in a trial of this nature, creep into the case and are sometimes unduly dwelt upon with no other purpose than to divert the minds of the jurors from the real and substantial things disclosed by the evidence in the case. Jurors in the proper discharge of their duties should permit none of these things to take their minds off of the issues presented to them, but should, without bias or prejudice either for or against the respective parties interested herein, weigh the evidence and give thereto such consideration as they honestly think the same is entitled to, and render their verdicts in accordance therewith.”

“The jury system is the fairest and best institution ever devised to settle questions of fact. When it works in the right way, its results are right; when it goes wrong, it is often because something wrongfully thrown into its machinery causes it to work in the wrong way.”

“Now, the defendant in this case, Gentlemen, is entitled to the individual opinion of each juror, and no juror should vote for the conviction of the defendant so long as he entertains a reasonable doubt of the defendant’s guilt, notwithstanding the opinions of others of the jury.”

“You know, Gentlemen, that a juror qualifies himself to make up his judgment only after he has given fair, full, impartial and candid consideration

to the facts in evidence. This means that he should bring to bear upon the question not only all his powers of mind, but that he should fully consider the views of his fellows. A criminal case is not submitted to jurors as individuals. No one juror is legally competent to decide it [25] adversely to the defendant on trial. It is submitted to the jury as a deliberative body, whose judgments are worthy only when they are produced by the contributions to the right solution of each member. Each juror, therefore, should not only attempt to think out the solution for himself, but he should allow his fellows to assist in his thinking. Even though having arrived at an opinion, he should consider with an open mind the diverse opinions of others. He should test his conclusions by the views of his fellows, and be ready not only to give his own views, but also to listen to those of others."

"In theory, at least, Gentlemen, a hung jury is seldom possible if every juror gives the same degree of fair, candid and cold-headed consideration to the case. This is so because the principles of reasoning and common sense are clear enough that men of average ability and reasonableness, and to such who are only competent for jury service, facts speak with much the same force. As jurors, Gentlemen, you apply to the work before you the same method of reasoning and the same standard of comparison of the weight of facts clearly established in the evidence as you would apply under equivalent conditions to a problem before you for solution in pri-

vate life. Under both circumstances your plain common sense, the education your experience and observations have brought you, are available with just the same degree of usefulness. Nothing resulting from your oath requires you to reason differently or change your mature method of reasoning from the course you would pursue in your private affairs in determining a serious question.”

“The only effect of your official position as jurors is to face you with the obligation to calmly and seriously study the evidence to ascertain the clear existence of fundamental facts asserted to have been shown in the evidence, and to coordinate them properly in the line of proof so that, as jurors, you are able to say that the elemental facts of the guilt charged [26] against the defendant is shown to a reasonable certainty; whereas, if it were a private matter, you might be satisfied with a solution which is supported by the mere preponderance of evidence.”

“Now, Gentlemen, the defendant in this case, Claude Emerson DuVall, is charged by the indictment with violations of the law of the United States known as the Harrison Narcotic Act. The indictment has been read to you. I will not read it again, because you will take it with you to your jury room. As you have noted from the reading, each of the two counts charges that on or about March 26th, 1935, in the District of Arizona, the defendant, a practicing physician, sold a quantity of morphine to one Pat Rooney, alias Fred Humphry, not on a

written order or blank form furnished for that purpose by the Commissioner of Internal Revenue, in the manner following, that the said defendant issued and dispensed to said Pat Rooney, alias Fred Humphry, a prescription for said morphine signed by the defendant, and that said Rooney, alias Humphry, was not then a patient of the said defendant doctor, and the said morphine was not dispensed by the defendant in the course of his professional practice only.”

“The Harrison Narcotic Act is primarily a revenue measure. The provisions of the Act on which the charges against this defendant, contained in the indictment, are based are as follows: ‘It shall be unlawful for any person to sell, barter, exchange or give away any of the products specified in Section 691 of this Title, except in pursuance of the written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.’ The law then provides for the preservation and inspection of such orders so given, and further provides: ‘Nothing contained in the Section shall apply (a) to the dispensing or distribution of any of the [27] aforesaid products to a patient by a physician registered under this Chapter in the course of his professional practice only’. In other words, the order form of the Commissioner of Internal Revenue is not required for the sale or distribution of narcotics if such distribution is made by a physician to a patient in the course of his professional practice only.”

“The Harrison Narcotic Act further provides: ‘The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of the Act into effect’. Such rules and regulations were duly promulgated, as required by the Act, and among other provisions of the regulations now in force and effect is the following: Article 85, which reads as follows: ‘A prescription in order to be effective in legalizing the possession of unstamped narcotic products and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the Act.’ ”

“Now, there are certain exceptions to the rule, set forth as follows: ‘Exceptions of this rule may be properly recognized, (1), in the treatment of incurable diseases, such as cancer, advanced tuberculosis, and other diseases well recognized as coming within this class, where a physician directly in charge of a bona fide patient suffering from such disease prescribes for such patient, in the course of his professional practice and strictly for legitimate medical purposes, and in so prescribing endorses upon the prescription that the drug is dispensed in the treatment of an incurable disease; or if he pre-

fers, he may endorse upon the prescription 'Exception [28] (1) Article 85'. (2) A physician may prescribe for an aged or infirm addict whose collapse would result from the withdrawal of the drug, provided he endorse upon the prescription that the patient is aged and infirm, giving age, or if he prefers he may endorse upon the prescription, 'Exception (2) Article 85'.'

"Now Gentlemen, you are instructed that the phrases 'to a patient' and 'in the course of his professional practice only' as used in the statute and rules and regulations which have been read to you, are intended to confine the immunity of the registered physician in dispensing narcotic drugs strictly within the bounds of the physician's professional practice and not to extend it to sale by such physician intended to cater to the appetite or satisfy the cravings of one addicted to the drug only. A prescription issued for either of the latter purposes protects neither the physician who knowingly issued it nor the dealer who knowingly accepts and fills it."

"The statute does not prescribe the diseases for which morphine may be supplied. Regulation 85 in its provisions forbids the giving of a prescription to an addict or habitual user of narcotics not in the course of professional treatment, but for the purpose of providing him with a sufficient quantity to keep him comfortable by maintaining his customary use. Neither the statute nor the regulations precludes a physician from giving an addict a mod-

erate amount of drugs in order to relieve a condition incident to addiction, if the physician acts in good faith and in accord with fair medical standards.”

“The term ‘narcotic drugs’, as used in the indictment and the statute which have been read to you, means opium, coca leaves, cocaine, and any salt, derivative or preparation of opium, coca leaves or cocaine.”

“Now, Gentlemen, the evidence before you is undisputed that at all of the times mentioned in the indictment the defendant, Claude Emerson DuVall, was a physician and duly registered [29] as required by the Harrison Narcotic Act.”

“It is also undisputed that if the sales or dispensations of morphine, as charged in the respective counts of the indictment were made, they were not made upon forms issued in blank for that purpose by the Commissioner of Internal Revenue. The circumstances under which an order of the Commissioner of Internal Revenue is required and the exceptions thereof have already been made known to you by the Court.”

“The evidence also shows that morphine sulphate is a derivative or preparation of opium. The evidence is undisputed that if the sales or dispensations of the drugs were made as charged in the respective counts of the indictment, they were made upon written prescriptions issued by the defendant as a practicing physician.”

“Now, Gentlemen, the defendant herein is charged in each of the two counts of the indictment with

the sale of morphine sulphate to one Pat Rooney, alias Fred Humphry, and that he issued prescriptions for the drug to him. Ordinarily the term 'sale' contemplates the disposal of one's own property to another, but under the laws of the United States and under this law, a sale may be effected by the issuance of a prescription for the drug, to be filled by another.'

"The Penal Code of the United States prescribed that 'Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal' and punishable as such."

"Taking this Section of the statute, together with the Narcotic Act read to you, you are instructed that if you are convinced by the evidence beyond a reasonable doubt that the defendant, at the time he issued the prescription set forth in the indictment, or either of them, that the same were not issued in the course of his legitimate professional practice only, and you also find that [30] such drugs were obtained by the witness Rooney on such prescriptions, or either of them such sale would be consummated on the filling of the prescriptions and the defendant would be guilty under the law of taking a principal part in the prohibited sale of narcotics belonging to another, by unlawfully issuing such prescription or prescriptions to the would-

be purchaser, and you should so find by your verdict."

"Now, as you have noted from the reading of the exceptions set forth in the statute, the law does not prohibit a registered physician from dispensing the drugs to a patient by prescription strictly in the course of his professional practice, but you are instructed that if you are convinced by the evidence beyond a reasonable doubt that the defendant in this case, being a registered physician, issued the prescriptions for the drug set forth in the indictment, and that the same were not issued to a patient in the course of the defendant's professional practice only, but were issued with the intent that the recipient, the said Pat Rooney, alias Fred Humphry, should obtain the narcotics from a druggist upon such prescriptions, and that the defendant had not given the prescriptions, or either of them, in good faith to treat disease from which the said Pat Rooney, alias Fred Humphry, was then suffering, the defendant took a principal part in a prohibited sale of narcotics, and by so doing violated the law, no matter whether the druggist to whom the prescription was delivered for filling has knowledge of the circumstances under which the physician has given the prescription, or is advised of any relationship that may have existed between the physician who gave the prescription and the recipient of the same."

"You are instructed, Gentlemen, that it is unlawful for any person to dispense or distribute nar-

cotic drugs except in accordance with the provisions of the Harrison Narcotic Act, as the same has been read to you, and a physician who procures [31] the dispensing thereof through the instrumentality of a prescription not issued in the course of his bona fide professional practice as a treatment for diseases takes a principal part in a prohibited sale, even though there is no conspiracy or unlawful understanding between him and the druggist who fills the prescription, and that is true whether the prescription be taken to a specified druggist or not. All prescriptions are expected to be and are filled according to the desire of the purchaser, at whatever drugstore he may select. The druggist, if innocent, is protected by the prescription.”

“In this case, if you are satisfied by the evidence beyond a reasonable doubt that the prescriptions, or either of them, were issued to Pat Rooney, alias Fred Humphry, as set forth in the indictment, and that, at the time of the issuance thereof, they, or either of them, were not issued in the course of the defendant’s bona fide professional practice, such prescriptions were unlawfully issued and in violation of said Act.”

“The good faith of the defendant treating the witness, Pat Rooney, as a physician, for the purpose of curing him from the narcotic habit is an important issue involved in this case. One of the objects of the Narcotic Act was no doubt intended to prevent the growing use of these narcotics deemed a menace to the nation by Congress. If a physician

and the others mentioned in the exceptions could sell and dispense these narcotics regardless of the fact whether it be done in good faith for the relief of a patient, then the moral object of the Act is entirely defeated, notwithstanding the fact that it is primarily a revenue measure. It cannot be claimed that a physician selling and dispensing these narcotics through a prescription, or otherwise, not in good faith for the purpose of securing the cure of one suffering from an illness, or to cure him from the narcotic habit, is doing so in the course of his professional practice only as prescribed by the express [32] language of the Act."

"Now, Gentlemen, you are instructed that when you come to consider of your verdict, the question for you to decide is as to whether or not the written prescriptions issued by the defendant, Claude Emerson DuVall, upon which the sales or dispensations are alleged to have been made, were issued by him in good faith to a patient in the course of his professional practice only. If they were, then the sales would be lawful and the defendant would be entitled to an acquittal on the respective counts of the indictment. If the prescriptions were issued in good faith and according to fair medical standards, in the curing of disease, and not merely to satisfy the cravings of the said person for such drug, then they may be said to have been issued in the course of the defendant's professional practice only; but if the prescriptions were not issued in good faith, but were issued to enable such person

to obtain morphine sulphate to satisfy his appetite and cravings for such drugs only, and not in the treatment of his patient, then the issuance of such prescriptions would not be in good faith nor in the course of the defendant's professional practice as a physician, and the sale and dispensing upon such prescriptions would not be lawful."

"You are instructed, Gentlemen, that the provisions of the Narcotic Act exempting a physician does not protect him if he dispenses the drug by writing a prescription for one who is not a bona fide patient, and it is not for the purpose of treating him in the course of his professional practice, and in this case, if the Government has shown to your satisfaction beyond a reasonable doubt that the prescriptions set forth in the respective counts of the indictment in this case were not issued by the defendant to a patient in good faith and according to fair medical standards, you would find the defendant guilty as charged. Unless you are so satisfied you would, of course, acquit the [33] defendant. If from the evidence offered in this case the defendant's conduct in prescribing for the witness Rooney conformed to fair medical standards, it would indicate good faith on the defendant's part; if not, it would suggest the dispensing of narcotics for commercial purposes in the manner forbidden by the Act."

"The law requires that narcotics be dispensed by a physician to a patient in the course of his professional practice only, as I have repeatedly told

you. In determining whether a prescription of narcotics by a physician is in the course of his professional practice, you are to consider if the prescribing of narcotics is in accordance with fair medical standards and in determining this question you will consider the testimony of all of the physicians who have testified here in the case, together with all the evidence in the case.”

“You are instructed, Gentlemen, that a reputable physician duly in charge of a bona fide patient suffering from diseases known to be incurable, such as cancer, advanced tuberculosis and many other diseases, well recognized as coming within this class, may in the course of his professional practice and strictly for legitimate medical purposes, dispense and prescribe narcotic drugs for such diseases, provided the patients are personally attended by the physician and he regulates the dosage and prescribes no quantity greater than that ordinarily recognized by members of his profession to be sufficient for the proper treatment of the given case. Prescriptions issued for such purposes and under such conditions are issued in accordance with the said Harrison Narcotic Act and the regulations now in effect, promulgated in accordance therewith.”

“You are instructed, Gentlemen, that a prescription issued by a practicing registered physician for morphine or other narcotics to a habitual user thereof, the prescription being issued by him in the course of his professional treatment in an

attempted cure of the habit, according to fair medical standards, and not for [34] the sole purpose of providing the user with such narcotics sufficient to keep him comfortable, is a prescription within the meaning of Section 2 of the Harrison Narcotic Act.”

“You are further charged that if upon all the evidence, you find the prescriptions in this case written by this defendant were issued for such purpose, then the issuance of such prescriptions did not constitute a violation of the Harrison Narcotic Act.”

“Now, if you find that the prescriptions written by the defendant which are in evidence in this case were written for the sole purpose of enabling the defendant to keep his patient, Pat Rooney, alias Fred Humphry, in such a condition as to enable him to treat a chronic or incurable disease from which the said patient was, in his opinion, suffering, or in treatment for a cure of Rooney’s addiction to the drug, then you must find that the prescriptions were prescribed within the meaning of said Act.”

“And you are further instructed that if upon all the facts of this case you find that the defendant honestly believed that the giving of morphine to the person named in the indictment was necessary according to fair medical standards to effect a cure or to stay the progress of disease from which said person was suffering, or to alleviate the pain thereof or to effect the cure of the addiction to the drug, and not merely for the purpose of satisfying the

cravings of an addict for the drug, even though in fact he made a mistake in the diagnosis of Rooney's condition when writing the prescription, then your verdict would be for the defendant."

"Now, Gentlemen, it has been shown by the evidence and it is admitted by the defendant that on prior occasions the defendant issued prescriptions containing morphine sulphate to the witness, Rooney. This testimony was admitted as bearing upon the intent and good faith with which the defendant issued the two prescriptions involved in the two counts of the indictment [35] only. You are not to convict the defendant because of the issuance of prior or other prescriptions. He is not on trial for having issued such prior or other prescriptions, and such prescriptions were admitted and are only to be considered by you as bearing upon and in determining the intent and the good faith of the defendant in issuing the prescriptions on which the sales are alleged in the indictment herein to have been made."

"You are charged that persons addicted to the use of morphine sulphate are diseased and are proper subjects for medical treatment. If you find, therefore, that the defendant prescribed the quantity of morphine sulphate prescribed in both counts of the indictment herein to said Pat Rooney, alias Fred Humphry, in the course of his professional practice only and according to fair medical standards for the treatment of such disease resulting from such addiction, then he was not violating the Harrison Narcotic Act."

“The Harrison Narcotic Act does not limit the quantity of morphine sulphate that a physician may prescribe for a person addicted to the use thereof, but the quantity which may be prescribed in such case is left to the judgment of the physician when acting in the course of his professional practice only and in accordance with fair medical standards.”

“You are instructed that the issuing of two prescriptions on the same day by the defendant to the said Pat Rooney, alias Fred Humphry, for four grains and three grains, respectively, of morphine sulphate, is not in itself a violation of the Harrison Narcotic Act, if you further find that Rooney was at the time the patient of the defendant and that such prescriptions were issued by the defendant in the course of his professional practice only and in accordance with fair medical standards.”

“Now, Gentlemen, you are instructed that the indictment in this case is of itself a mere accusation and a charge against the defendant, and no juror in the case should permit [36] himself to be to any extent influenced against the defendant merely on account of the indictment in the case.”

“In order to convict the defendant of the crime charged in the indictment it is incumbent upon the Government to satisfy you beyond a reasonable doubt of the truth of every material allegation in the indictment. The law raises no presumption against the defendant, but every presumption of law is in favor of his innocence, and this presumption attends at every stage of the trial, until over-

come by competent evidence to the contrary. It is not necessary that the offense be proven to have been committed at the exact time specified in the indictment, but it is sufficient, so far as time is concerned, if the proof shows it to have been committed about the time specified in the indictment, and before the filing of the indictment. The offense must, of course, have been proven to have been committed within the District of Arizona. I charge you, Gentlemen, that as a matter of law, that if the offense has been committed within the State of Arizona it has been committed in the District of Arizona, because the District of Arizona embraces the entire State of Arizona.”

“Now, Gentlemen, you are made by the law the sole judges of the facts in this case and of the credibility of each and all of the witnesses who have appeared here before you, and of the weight you will give to the testimony of the several witnesses who have been here on the stand. In determining the credibility of any witness and the weight you will give to his or her testimony, you have the right to take into consideration his or her manner while giving his or her testimony, his or her means of knowledge, any interest or motive he or she may have, if any such be shown, and the probability or improbability of the truth of his or her statements when considered in connection with all the other evidence in the case. If you believe that any witness has wilfully sworn falsely on any material fact in the case, then you have the right to wholly disregard

the test- [37] imony of such witness, except in so far as his or her statements may be corroborated by other credible evidence in the case.”

“I charge you, Gentlemen, that before you can find the defendant guilty you must find him guilty beyond a reasonable doubt. A reasonable doubt, as applied to evidence in criminal cases, is just what the term implies, a reasonable doubt. It is such a doubt as you may entertain as reasonable men after a thorough review and consideration of all the evidence, a doubt for which a reason arising from the evidence or from a lack of evidence exists. It is not a mere possibility of a doubt, but a serious, substantial and well-founded doubt. While it is true that the Government is required to prove the guilt of the defendant beyond a reasonable doubt, it is not required to prove his guilt to a mathematical certainty. Such a thing as mathematical certainty cannot, of course, exist in the enforcement of law. All that the courts and juries can act upon is belief to a moral certainty. It may be said that everything relating to human affairs and depending upon human evidence is open to some fanciful doubt or conjecture. It would seem that the doctrine of reasonable doubt is not a convenient excuse to avoid doing something unpleasant, nor an occasion for stubbornness, but simply a call to candid and fair-minded men to be careful and not decide until they are convinced of the guilt of the defendant as charged to a reasonable certainty. When you are convinced to a reasonable certainty—not an actual certainty

but a reasonable certainty—you are convinced beyond a reasonable doubt. The terms are convertible.”

“Some evidence has been brought during the progress of this trial showing that the witness Pat Rooney, to whom the sales alleged in the two counts of the indictment were made, was sent to the defendant’s office and to his residence for the prescriptions alleged by or at the instigation of the Government officers, acting in the nature of a decoy. The law is that decoys are permissible to detect criminals but not to create them, to present [38] the opportunity to those having the intent or who are willing to commit a crime, but not to entrap law-abiding citizens unconsciously committing offenses. That is the distinction to be drawn by you. No officer is permitted to entrap an innocent person into the commission of a crime and then prosecute him or her, and no conviction on such evidence would or could be sustained, but if that officer has information which he follows up and if he finds that the defendant is a person willing to commit a crime, then it is his province, his right and his duty to give such person an opportunity to commit the crime or offense, and if he or she does commit such offense, then it is the duty of the officer to apprehend him or her. Public policy, of course, forbids that officers sworn to enforce the laws seek to have them violated, and that those whose duty it is to detect crimes should create them, but if the intent and purpose to violate the law were present, the

mere fact of the officer furnishing the opportunity is no defense to the person who then violated the laws. This is the distinction to be made by you. It would not be proper for an officer to go to an innocent man and induce him to commit an offense and then prosecute him, but if that officer goes to one ready and willing to violate the law and then offers him that opportunity, then that evidence may be used against the defendant. This is permissible, Gentlemen, because in many cases in no other way could a persistent violator of the law ever be apprehended or punished.”

“Gentlemen, you are instructed that a witness who is a narcotic addict is a competent witness to testify on the trial of actions in this Court. The jury should take into consideration the fact of such addiction to the use of narcotics as affecting his character and credibility as a witness. In this case it is admitted that the witness, Pat Rooney, alias fred Humphry, was for a number of years an addict to the use of narcotics. You are instructed that you are not to arbitrarily disregard the testimony [39] of such witness solely because he is so addicted, but you should weigh his testimony as you would the testimony of any other witness, and apply the same rules as govern the testimony of witnesses generally, as stated here in these instructions.”

“Now, gentlemen, during the taking of the testimony and in the progress of this trial certain hypothetical questions have been propounded to expert witnesses by both the Government and the defense,

and these expert witnesses, medical men, have appeared on the witness stand and have afforded you with answers to such hypothetical questions. You are instructed, Gentlemen, that a hypothetical question is a question which assumes a certain condition of things to be true, a certain number of facts to be proved or disproved, and calls upon the witness to assume all of the material facts stated to be true, and express his opinion as to certain conditions thereof. The witness to whom the hypothetical question is addressed assumes them to be true and bases his answer upon the assumed case. The opinion of the witness must therefore be brought to the test of the facts in order that you may judge to what weight the opinion is entitled. As I have stated to you, Gentlemen, certain members of the medical profession have been brought here by both the Government and the defense. This testimony is usually known as expert testimony, that is to say, the testimony of medical men who, by reason of their education and experience along the lines of evidence given by them are deemed to have such skill and knowledge thereof as to make their opinions admissible for the purpose of aiding the jury in arriving at a conclusion as to the disputed facts in this case. This sort of testimony is subject to the same scrutiny as any other evidence admitted in the case. The expert witnesses are to be subjected to the same tests as other witnesses, and you may look to their appearance and demeanor on the stand, their bias and interest in the case, if any shall appear to you, and in fact test their credibility as

you would that of any other [40] witness. You may accord the testimony of such witnesses whatever weight, under all the circumstances, that you may find it entitled to, or you may disregard it entirely, or in part, in so far as you may believe from all the facts and circumstances in the case and the common experience of mankind that it is reliable or unreliable. In short, the opinions of the medical experts in this case are to be considered by you in connection with all the other evidence in the case and subject to the same tests."

"Now, Gentlemen, the defendant has brought to the stand here several witnesses who have testified to his good reputation. The testimony as to his truth and veracity has been received here in the case. You should consider such evidence, together with all the other evidence in the case, in arriving at a verdict, not only where a doubt exists as to the defendant's guilt but for the purpose of creating a reasonable doubt, but if from all the evidence in the case, including the evidence of his good character and reputation, you are satisfied of his guilt beyond a reasonable doubt, such evidence of good character or reputation will not avail the defendant as a defense or entitle him to an acquittal. The law permits a defendant at his own request to testify in his own behalf. The defendant in this case has availed himself of that right. His testimony is before you and you must consider how far it is credible. The special personal interest which he has in the result of this case may be considered by you in weighing his evidence and in determining how far

or to what extent, if at all, it is worthy of credit. In considering the credibility of or weight which you should attach to the testimony of the defendant you should regard, among other things, the inherent probability or improbability of his statements and to what extent the same have been corroborated or contradicted by other evidence in the case. Where a witness has a direct personal interest in the result of a case, especially a criminal case, the temptation may be strong to color, pervert or withhold [41] the facts."

"Gentlemen, you should not consider as evidence any statements of counsel made during this trial, unless such statements was made as an admission or a stipulation conceding the existence of a fact or facts, or based upon evidence adduced during the trial of this case. You must not consider for any purpose any evidence offered and rejected or which has been stricken out by the Court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced here and the inferences which you may deduce therefrom."

"Now, Gentlemen, when you were questioned as to your qualifications to serve as trial jurors in this case you were asked specifically if you would determine this case solely on the evidence adduced here on the stand and the instructions which would be given you by the Court, that you would not allow

any matters of feeling or sympathy to creep into your deliberations in considering the verdict that you would render in this case. I call your attention again to that qualification on your part as jurors in the case. You will not consider, Gentlemen, whether the punishment in case of a conviction on a charge of this character is severe or light; that is a matter that is not within the province of the jury, but rests entirely as a matter within the control of the Court, subject to such limitations as are provided by law."

"The issue before you, Gentlemen, as stated in the beginning, is whether or not the defendant sold and dispensed,—if you find that he did sell and dispense—the drugs as charged in the indictment in the course of his legitimate professional practice in an attempt to alleviate or cure the ills of a bona fide patient, or whether he sold or dispensed these drugs—if you are satisfied beyond a reasonable doubt that he did sell or dispense them—merely for the purpose of gratifying the appetite [42] of an unfortunate victim of the drug. If you are satisfied beyond a reasonable doubt by the evidence in this case that he did dispense the drugs mentioned in the indictment and that the same were not dispensed to a patient in the course of his legitimate professional practice only, but were dispensed for the purpose of gratifying the appetite of a victim of the drug, you would by your verdict find the defendant guilty as charged in the respective counts of the indictment, in which you are so convinced. If you are not so convinced beyond a reasonable doubt you will, of course, acquit the defendant."

“When you retire to the jury room you will take with you the indictment and the form of verdict, which is substantially in the following form: ‘We, the jury, duly empaneled and sworn, on our oaths do find the defendant Claude Emerson DuVall—blank—as charged under the first count of the indictment’, in which blank you will insert the words ‘guilty’ or ‘not guilty’, as coincide with your findings on the first count, ‘and—blank—as charged in the second count of the indictment,’ in which blank space you will fill in and supply your conclusions, stated in the same manner, and have your verdict signed by your foreman and returned into open court. The law requires that all twelve of you gentlemen reach a verdict on each of the two counts, and that means that the verdict of the jury should be unanimous.”

“Are there any exceptions to be noted?”

Mr. HARDY: We have no others to submit, but for the purpose of the record, as we are required to do, and which has been heretofore raised, we do take exceptions to that part of your Honor’s charge with respect to the moral aspect of the Harrison Narcotic Act and also with respect to the regulations thereunder, in so far as they are unconstitutional and are in conflict with the Harrison Act.

The COURT: Very well.

Objection overruled and exception allowed. [43]

On June 31, 1935 the jury, after deliberating upon its verdict, returned in open court its verdict finding the defendant guilty as charged in both counts of the indictment.

On July 1, 1935 the court pronounced judgment upon the defendant sentencing him as follows:

Upon count one of the indictment to 14 months imprisonment in such penitentiary or institution as the Attorney General may designate; and to pay a fine of \$500.00.

Upon count two of the indictment to 14 months imprisonment in such penitentiary or institution as the Attorney General may designate to run concurrently with the sentence on count one; and to pay a fine of \$500.00.

After judgment was pronounced, and on the same day, the defendant filed a Notice of Appeal which recites as follows:

[Title of Court and Cause.]

NOTICE OF APPEAL.

Name and address of Appellant:

Claude Emerson DuVall,
1139 North Stone Avenue,
Tucson, Arizona.

Name and addresses of Appellants' attorneys:

Leslie C. Hardy,
315 Valley National Bank Building,
Tucson, Arizona.

Clarence V. Perrin and Milton H. Cohan
(Cohan and Perrin)
Central Building,
Tucson, Arizona.

Offense:

Violation of Section 696, Title 26, U. S. C. A.
(Issuing prescriptions by physician in violation of Harrison Narcotic Act.)

Date of Judgment:

July 1st, 1935. [44]

Brief description of judgment or sentence:

First count of the indictment: Imprisonment for 14 months in such penitentiary, institution or Road camp as the Attorney General may designate, and a fine of \$500.00.

Second Count of the indictment: Imprisonment for 14 months in such penitentiary, institution or road camp as the Attorney General may designate, to run concurrently with the first count, and a fine of \$500.00.

Name of prison where now confined, if not on bail:

Appellant admitted to bail on appeal in the sum of \$5,000.00.

I, the above-named appellant hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

CLAUDE EMERSON DuVALL

Appellant.

Dated at Tucson, Arizona, this 1st day of July, 1935.

GROUNDS OF APPEAL.

1. That the indictment does not set forth facts sufficient to constitute an offense against the laws of the United States.

2. That there is a variance between the proof and the indictment in that the proof discloses that the sale of the narcotics in the manner and form charged in the indictment was made to a person other than the person named in the indictment.

3. That the Court erroneously charged the jury with respect to the application of Article 85, and Exceptions 1 & 2 thereto, of Regulations No. 5 promulgated by the Treasury Department on January 1, 1928 pursuant to the Harrison Narcotic Act.

[45]

4. That the Court erroneously charged the jury with respect to the moral aspect of the Harrison Narcotic Act in its application to the defendant who was a licensed physician registered under said Act.

(Filed July 1, 1935)

After the foregoing Notice of Appeal was filed, and on the same day, the court of its own motion, made and entered the following order:

[Title of Court and Cause.]

ORDER.

The defendant having filed with the Clerk of this Court his notice of appeal from the verdict and sentence herein, it is

ORDERED that said defendant be admitted to bail on appeal herein in the sum of Five Thousand Dollars (\$5,000.00).

IT IS FURTHER ORDERED that counsel for the defendant prepare and lodge with the Clerk of this Court his proposed bill of exceptions, together with his assignments of error on or before August 7th, 1935, and that the Government prepare and file any proposed amendments or exceptions thereto on or before August 17th, 1935, and that both parties appear before this Court on Monday, August 19th, 1935 to settle said bill of exceptions, and that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, such bill of exceptions when settled, the assignments of error and such portions of the record as the appellant shall request by filing praecipe therefor on or before August 7th, 1935, together with such additional portions of the record as the Government shall request in its praecipe filed before August 17th, 1935, together with the certificate of the Clerk of this Court.

IT IS FURTHER ORDERED that defendant furnish cost bond to the Government in the sum of Two Hundred Fifty Dollars, and [46]

IT IS FURTHER ORDERED that all copies required by the Clerk in preparation of the record in accordance herewith be furnished by counsel at the time of filing their praecipe as hereinbefore ordered and that a copy of this order be forwarded by the Clerk of this Court to the Clerk of said Circuit

Court of Appeals, together with the duplicate notice of appeal filed herein and the docket entries required.

(Filed July 1, 1935)

AND NOW, in furtherance of justice, and that right may be done the defendant, he files and presents the foregoing Bill of Exceptions in this cause, and prays that the same may be approved, settled and allowed, and signed and certified by the Honorable Judge of this Court as provided by law.

DATED at Tucson, Arizona, in the district aforesaid, this 5th day of August, 1935.

LESLIE C. HARDY,
Attorney for Defendant-Appellant.

CERTIFICATE AND ORDER ALLOWING,
APPROVING AND SETTLING BILL OF
EXCEPTIONS.

The foregoing Bill of Exceptions was filed on the 5th day of August, 1935, which is within the time fixed for filing said Bill of Exceptions by the order of this Court filed herein on July 1st, 1935 and set forth in the foregoing Bill of Exceptions; that said Bill of Exceptions is correct, and it is hereby approved, allowed and settled, and filed as a part of the record herein on the day of this Certificate and Order, which is within the time fixed for allowing, approving, and settling said Bill of Exceptions by said order of this Court dated July 1st, 1935, all of which is done within the May, 1935 term of this

Court whereat the verdict was returned and the judgment pronounced herein.

DATED at Tucson, in the district aforesaid, this 17th [47] day of August, 1935.

ALBERT M. SAMES,
United States District Judge
for the District of Arizona.

Service of a true copy of the foregoing Bill of Exceptions admitted this 5th day of August, 1935.

FRANK E. FLYNN,
U. S. Attorney.

By K. BERRY PETERSON,
Assistant U. S. Attorney.

[Endorsed]: Deft's Proposed Bill of Exceptions.
Filed Aug. 5, 1935.

[Endorsed]: Bill of Exceptions. Filed Aug. 17,
1935. [48]

[Title of Court.]

MINUTE ENTRY OF SATURDAY,
AUGUST 17, 1935.

(Tucson General Minutes)

May 1935 Term At Tucson
Honorable Albert M. Sames, United States Dis-
trict Judge, Presiding.

[Title of Cause.]

ORDER APPROVING BILL OF EXCEPTIONS

John P. Dougherty, Esquire, Assistant United
States Attorney, appears for the Government. No

appearance is made on behalf of the Defendant.

Counsel for the Government now represents to the Court that the Government has no amendments to propose to the Defendant's Proposed Bill of Exceptions heretofore filed herein and that the Government has no objection to make to the form thereof, and that said Proposed Bill of Exceptions is correct. Whereupon, it appearing to the Court that the said Proposed Bill of Exceptions has been filed within the time allowed and that no objections or proposed amendments will be made thereto by the Government.

IT IS ORDERED that said Proposed Bill of Exceptions be, and the same is hereby allowed, settled and approved as the bill of exceptions herein and made a part of the record in this cause. [49]

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Claude Emerson DuVall, as Principal and L. E. Wyatt and Margaret Wyatt, his wife, and Alma Clayton, a widow, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs,

executors and administrators, jointly and severally, by these presents:

Sealed with our seals and dated this 1st day of July, 1935.

WHEREAS, lately at the May 1935 term of the District Court of the United States, in and for the District of Arizona, a judgment was rendered and sentence pronounced against the said Claude Emerson DuVall in the above entitled cause, and the said Claude Emerson DuVall has filed a notice of appeal from said judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, the condition of the above obligation is such that if the said Claude Emerson DuVall shall prosecute said appeal to effect, and answer all costs if he shall fail to make good his pleas, then the above obligation to be void, else to remain in full force and virtue. [50]

[Seal] CLAUDE EMERSON DuVALL,
Principal.

[Seal] L. E. WYATT,
Surety.

[Seal] MARGARET WYATT,
Surety.

[Seal] ALMA CLAYTON,
Surety.

State of Arizona,
County of Pima—ss.

L. E. WYATT and MARGARET WYATT, who are husband and wife, and the persons whose names are subscribed as sureties to the above undertaking, being duly sworn, state that as such sureties named in the above undertaking, they are residents and householders within the County of Pima, State of Arizona, and that they are worth the amount specified in the said undertaking as the penalty thereof, over and above all just debts and liabilities, exclusive of property exempt from execution.

L. E. WYATT,

[Commissioner's Seal]

MARGARET WYATT.

Subscribed and sworn to before me this 1st day of July, 1935.

C. WAYNE CLAMPITT,
United States Commissioner.

State of Arizona,
County of Pima—ss.

ALMA CLAYTON, the person whose name is subscribed as one of the sureties to the above undertaking, being duly sworn, states that as one of the sureties named in the above undertaking, she is a resident and householder within the County of Pima, State of Arizona, and that she is worth the amount specified in the said undertaking as the penalty thereof, over and above all just debts and liabilities, exclusive of property exempt from execution.

ALMA CLAYTON.

Subscribed and sworn to before me this 1st day of July, 1935.

[Commissioner's Seal]

C. WAYNE CLAMPITT,
United States Commissioner. [51]

The foregoing Cost Bond on Appeal is approved this First day of July, 1935.

ALBERT M. SAMES,
U. S. District Judge.

Filed July 1, 1935.

[Endorsed]: Filed Jul. 1, 1935. [52]

[Title of Court and Cause.]

DEFENDANT'S PRAECIPE FOR
TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the District Court of the United States for the District of Arizona:

You are hereby respectfully requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to the appeal taken by the defendant in the above entitled cause, and to include in such transcript of record the following:

1. The Indictment.
2. Bill of Exceptions when allowed, approved and settled, including the Certificate of the United States District Judge thereto and the Order approving, settling and allowing said bill.

3. Assignment of Errors.
4. Cost Bond on Appeal.
5. This Praecipe.

Dated at Tucson, in the district aforesaid, this 5th day of August, 1935.

LESLIE C. HARDY

Attorney for Defendant-Appellant.

Service of the above Praecipe acknowledged and accepted this 5th day of August, 1935.

FRANK E. FLYNN

United States Attorney

By K. BERRY PETERSON

Ass't United States Attorney.

[Endorsed]: Filed Aug. 5, 1935. [53]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF ARIZONA.

United States of America,
District of Arizona—ss.

I, J. LEE BAKER, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, versus Claude Em-

erson DuVall, Defendant, numbered C-7287 Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 53, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$8.00 and that said sum has been paid to me by the appellant.

WITNESS my hand and the Seal of the said Court this 19th day of August, 1935.

[Seal]

J. LEE BAKER, Clerk

United States District Court
District of Arizona. [54]

[Endorsed]: No. 7908. United States Circuit Court of Appeals for the Ninth Circuit. Claude Emerson DuVall, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed August 23, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

